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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 119

SAMUEL REISMAN, and CHARLES M. TRAMMELL, BERT B. RAND, HANS A. NATHAN, d/b/a TRAMMELL, RAND & NATHAN, *Petitioners*,

v.

HON. MORTIMER M. CAPLIN, and ROBERT S. MACCLURE and EDWARD H. HARNEY, co-partners and all other co-partners of ROBERT S. MACCLURE, as a class, d/b/a PEAT, MARWICK, MITCHELL & Co. (a co-partnership), *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Dated: May 8, 1963.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

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No.

SAMUEL REISMAN, and CHARLES M. TRAMMELL, BERT B. RAND, HANS A. NATHAN, d/b/a TRAMMELL, RAND & NATHAN, *Petitioners*,

v.

HON. MORTIMER M. CAPLIN, and ROBERT S. MACCLURE and EDWARD H. HARNEY, co-partners and all other co-partners of ROBERT S. MACCLURE, as a class, d/b/a PEAT, MARWICK, MITCHELL & CO. (a co-partnership), *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on February 7, 1963.

CITATIONS TO OPINIONS BELOW

The Findings of Fact and Conclusions of Law of the District Court, and Order thereon (R. 145-150), printed in Appendix B hereto, infra, pp. 9a-14a, are reported in 61-2 USTC § 9673 (1961).

The Opinion of the Circuit Court of Appeals, printed in Appendix B hereto, *infra*, p. 3a, has not yet been reported.

JURISDICTION

The Judgment of the Circuit Court of Appeals was entered on February 7, 1963. See Appendix B, p. 9a, *infra*. Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. The first question presented is whether a suit to restrain the Commissioner of Internal Revenue from enforcing a subpoena issued under color of § 7602, Internal Revenue Code of 1954, but actually in violation of the Fourth Amendment to the Constitution, is barred by the Sovereign Immunity Doctrine.

2. The second question presented is whether a taxpayer—faced with an unexplained multi-million dollar claim for federal taxes—may be deprived of the effective assistance of Counsel in a pending Tax Court proceeding, by Respondent Commissioner's forcing Counsel to reveal to him their entire trial preparation in advance of trial.

3. The third question presented is whether an attorney who has hired a Certified Public Accountant to assist him in preparation for trial and in advising a taxpayer client, has "standing to sue" in order:

(a) to protect his own ability to fulfill his duty as an officer of the Court and attorney-at-law;

(b) to protect against appropriation by opposing Counsel of his property rights in his work-product.

4. The fourth question presented is whether the attorney-client privilege against disclosure by the attorney of confidential communications between him and his client extends to non-lawyer accountants and clerks, employed by the attorney.

STATUTE INVOLVED

The Statutory provisions involved are Sections 7602 and 7604 of the Internal Revenue Code of 1954, 26 U.S.C. 7602, 7604. They are printed in Appendix A, *infra*, pp. 1a to 2a.

STATEMENT OF THE CASE

Petitioners are Los Angeles and Washington attorneys. They represent two United States citizens, Martin and Allyn Bromley, husband and wife, in connection with alleged tax deficiencies which are the subject matter of pending litigation in the Tax Court and of continuing criminal and civil investigation by Respondent Commissioner of Internal Revenue.

Petitioners were retained after the tax controversies arose and had no part in the preparation of the tax returns.

Upon accepting the engagement, as was and is their custom in tax cases of this magnitude, Petitioners TRAMMELL, RAND & NATHAN employed Respondents PEAT, MARWICK, MITCHELL & Co., a firm of Certified

Public Accountants, in order to assist them in their preparation for trial in the Tax Court, by gathering information for Petitioners from the clients and by interpreting such information to Petitioners.

Respondents PEAT, MARWICK, MITCHELL & Co., prior to their having been retained by Petitioners TRAMMELL, RAND & NATHAN, had no contact whatever with, and did not know, the taxpayers. The tax returns in issue were prepared by another Certified Public Accountant.

Petitioner-attorneys paid several thousands of dollars to the accountants for this preparatory work. Trial in the Tax Court was set for October 1961. On June 30, 1961, Respondent Commissioner, under color of proceeding under Section 7602, Internal Revenue Code of 1954, subpoenaed three branches of the Respondent accounting firm (in Los Angeles, Chicago and New York) to testify on their work prior to trial and before a Special Agent of Respondent Commissioner. The subpoena also required the accountants to turn over to the Commissioner all documents, work papers and other material in their possession.

Respondent-Accountants advised Petitioner-Attorneys that they would produce the requested documents and would testify fully, so as not to risk contempt proceedings for failure to do so. To avoid disclosure and unlawful appropriation of their work-product and to prevent the seizure without warrant of confidential and privileged documents for future use as evidence in possible criminal proceedings, Petitioners moved for, and obtained a temporary Restraining Order in the United States District Court for the District of Columbia. Several weeks later (but still prior to trial in the Tax Court), another Judge of the same Court dis-

solved the Restraining Order, dismissed the Complaint and found that Petitioners had no "standing to sue".[1]

The Court of Appeals for the District of Columbia Circuit affirmed the Judgment of the District Court, holding that the Complaint was properly dismissed, but for different reasons than those relied on by the District Court, namely, that:

> "... it is not within the Court's jurisdiction because it is, in substance, a suit against the United States to which it has not consented."
>
> —Opinion, p. 4.

Petitioners respectfully submit that the Court of Appeals was in error in holding that the suit falls within the Sovereign Immunity Doctrine, and that the District Court was in error in holding that Petitioners had no standing to sue.

REASONS FOR GRANTING THE WRIT

1. The decision of the United States Court of Appeals for the District of Columbia Circuit is in direct conflict with (1) the decision of the United States Court of Appeals for the Ninth Circuit in *DeMasters* v. *Arend*, 313 F. 2d 79 (1963) (App. C, *infra*, pp. 17a, *seq.*), and (2) the decision of the Circuit Court of Appeals for the Second Circuit in *Application of Colton*, 291 F. 2d 487 (1961) (App. C, *infra*, pp. 33a, *seq.*).

[1] By Stipulation and Order based thereon, Respondent Commissioner refrained from enforcing the Summonses pending disposition of the Appeal in the Appellate Court. He has opposed a further stay of enforcement proceedings pending disposition of this Petition because of the "*imminent running of the Statute of Limitations on possible criminal offenses*". (Opposition, p. 2); (Emphasis supplied).

The Court below held, on the authority of *Larson* v. *Domestic & Foreign Commerce Corporation*, 337 U.S. 682, 69 S. Ct. 1457 (1949) and *Malone* v. *Bowdoin*, 369 U.S. 643, 82 S. Ct. 980 (1962), that:

> "The suit accordingly seems to us to be an effort to restrain the United States, and therefore to fall within the sovereign immunity doctrine."
>
> —Opinion, p. 4 (App. B, *infra*, p. 6a).

The Court of Appeals for the Ninth Circuit in *DeMasters* v. *Arend* held on the authority of the identical cases of *Malone* v. *Bowdoin*, *supra* and *Larson* v. *Domestic & Foreign Commerce Corporation*, *supra*,[2] that such suit:

> "would not be barred by the doctrine of sovereign immunity."
>
> —Opinion, at p. 85
> (App. B, *infra*, pp. 20a-21a).

The Court of Appeals for the Second Circuit in the *Colton* case, *supra*, (at pp. 489, 490), (App. B, *infra*, p. 36a), held that such suit is not "against the Government without its consent".

The jurisdictional facts relied on by the respective plaintiffs in the *Arend*, *Colton* and *Reisman* cases, on the other hand, are identical. In all three cases the contention is that the respective Respondents, the in-

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[2] The Court of Appeals for the Ninth Circuit is

> ". . . also satisfied that this taxpayer's suit is neither one for declaratory judgment 'with respect to federal taxes' precluded by 28 USC § 2201; nor an action 'for the purpose of restraining the assessment or collection of any tax' precluded by 26 USCA § 7421 (a)".
>
> (ibid., footnote 8).

dividual Special Agent [DeMasters] or the Commissioner directing the Special Agent [Respondent Caplin] in whose very name the subpoenas were issued (J.A. p. 19), acted unlawfully and beyond their respective Statutory authority.

The Court of Appeals for the District of Columbia Circuit, we submit, erroneously, held that, "in this case the Commissioner does not appear as yet to have departed from his Statutory authority" (p. 7a, *infra*). The uncontradicted complaint below, supported by a sworn affidavit, alleged just that: namely, that the Respondent has not issued the summons for any of the enumerated Statutory purposes,

> "of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability"
>
> —26 U.S.C. 7602 (App. A, *infra*, p. 1a).

On the contrary, the complaint and the uncontradicted affidavit show that the summons was issued in violation of the Statutory command, for the sole purposes of obtaining attorneys' trial preparation and evidence to be used in criminal prosecution of their clients, in violation of the Fourth Amendment.

In the Court below, Respondent admitted that he wanted the books and records and work papers involved, in view of the pending cases before the Tax Court (J.A., p. 83). In this Court, in opposing Petitioners' Application for a Stay of Mandate, Respondent urged that these records were important in view of

the "imminent running of the Statute of Limitations on possible criminal offenses".

It is respectfully submitted that Congress carefully spelled out and enumerated in § 7602 of the Internal Revenue Code of 1954, all purposes for which a Revenue subpoena may be used. *Expressio unius est exclusio alterius. Continental Casualty Co.* v. *U. S.*, 314 U.S. 527, 533; 62 S. Ct. 393, 396 (1942). The purposes for which the subpoenas were sought in the case at bar are not authorized by Statute. The Respondent therefore acted illegally, beyond his Statutory authority and in violation of Constitutional and common law rights of Petitioners and their clients.

As the United States District Court for the District of Columbia held in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 103 F. Supp. 569 (at p. 576) (1952), affirmed by this Court at 72 S. Ct. 863:

> "Charles Sawyer is the defendant, and the Supreme Court has held on many occasions that officers of the Executive Branch of the Government may be enjoined when their conduct is unauthorized by statute, exceeds the scope of constitutional authority, or is pursuant to unconstitutional enactment" [citing Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 69 S. Ct. 1457, 93 L. Ed. 1628; Land v. Dollar, 330 U.S. 731, 67 S. Ct. 1009, 91 L. Ed. 1209; Philadelphia Co. v. Stimson, 223 U.S. 605, 32 S. Ct. 340, 56 L. Ed. 570; United States v. Lee, 106 U.S. 196, 1 S. Ct. 240, 27 L. Ed. 171.]

2. The Court below conceded that Respondent's actions may indeed be illegal. (Op. p. 6, App. B, p. 8a, *infra*). Nevertheless, the Court erroneously held that Sec. 7604 constitutes Petitioners' exclusive avenue of judicial review. It is submitted that this holding

was incorrect as a matter of law. *Application of Colton, supra; DeMasters* v. *Arend, supra; Application of Daniels,* 140 F. Supp. 322 (U.S.D.C. S. D. N.Y., 1956); *International Commod. Corp.* v. *Internal Revenue Service* 224 F. 2d 882 (C.A. 2, 1955); *In re Turner,* 309 F. 2d 69 (C.A. 2, 1962). Cf. *Rusk* v. *Cort,* 369 U.S. 367, 82 S. Ct. 787 (1962).

The holding was also erroneous on the facts in this case. The record shows that the accountants would have complied with the subpoena rather than risk[3] contempt proceedings (J.A. 46).

3. The questions presented by this petition are of importance to the administration of Sec. 7602 of the Internal Revenue Code and to the protection of citizens' rights under the Fourth and Fifth Amendments to the Constitution.

They are also of importance in the general administration of justice in relation to the attorney-client privilege.

It is recognized as a practical matter that in litigation of certain magnitude or technical difficulty, an attorney must avail himself of the services of non-attorney assistants, as, for instance, clerks, stenographers, interpreters and accountants. The cases in the several circuits, however, are in conflict as to the applicability of the attorney-client privilege to such non-attorney

[3] The justification for the accountants' apprehension was shown to the Court below upon its specific post-argument inquiry, by citation to *Application of U.S. (Carroll),* 246 F. 2d 762; 149 F. Supp. 634 (US DC SD NY, 1957); *In re Wolrich,* 84 F. Supp. 481 (US DC SD NY, 1949); *Sale* v. *United States,* 228 F. 2d 682 (C.A. 5, 1956); and *U. S.* v. *Becker,* 259 F. 2d 869 (C.A. 2, 1958), 58-1 USTC 9403.

assistants. In *U. S.* v. *Kovel*, 296 F. 2d 918 (C.A. 2, 1961), the Court of Appeals for the Second Circuit has recognized a narrow privilege where the communication is made in confidence to an accountant for the purpose of obtaining legal advice from the lawyer (at 922).

In the case at bar, the District Court's finding that what was sought was "accounting advice" was clearly erroneous. The client had never consulted the accountant. On the contrary, the accountant sought from the client, in confidence and for the lawyer, the information required by the lawyer to try the client's case. It should have granted the injunction even under the narrow *Kovel* rule. But the decision of the Court below is in conflict also with the decision of this Court in *Hickman* v. *Taylor*, 329 U.S. 495; 67 S. Ct. 385 (1947). Unless reversed, it permits Respondent in the future to appropriate the work-product of every attorney using an accountant in preparing a tax case. Cf. *Alltmont* v. *United States*, 177 F. 2d 971 (C.A. 3, 1949); *Martin* v. *Capital Transit Co.*, 170 F. 2d 811 (C.A. D.C. 1948); *Carpenter-Trant Drill Co.* v. *Magnolia Petroleum Corp.*, 23 F.R.D. 257 (D.C. D. Nebr. 1959).

4. The taxpayer personally and through his attorney specifically claimed his Constitutional privileges under the Fifth Amendment. The privilege was properly claimed. *Grant* v. *U. S.*, 227 U.S. 74 (1913), 33 S. Ct. 190; *Brody* v. *U. S.*, 243 F. 2d 378 (1957); *Application of J. M. House*, 144 F. Supp. 95 (D.C. Cal., 1956), and *Colton, supra.* Respondent has declared before this Court that the evidence is required for criminal prosecution. But even without this open admission, the

attempted violation of Constitutional rights was patent.[4] Therefore, the Restraining Order should have issued on these grounds alone. *Coplon* v. *United States*, 191 F. 2d 749 (C.A. D.C. 1951), 89 U.S. App. D.C. 103 (Cert. Den.), 72 S. Ct. 363, 342 U.S. 926, 96 L. Ed. 690; *Caldwell* v. *United States*, 205 F. 2d 879 (C.A. D.C. 1953), U.S. App. D.C. 355.

As the Court said in *U. S.* v. *O'Connor*, 118 F. Supp. 248 (D.C. D. Mass. 1953):

> "So far as this Court knows, Congress has never in criminal matters vested the executive with an unrestriced subpoena power to uncover information which might aid in the enforcement of criminal statutes and the preparation of criminal cases. Cf.

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[4] "Some courts have failed to realize the great distinction between the function of an Internal Revenue Agent and a Special Agent. The Constitution gives the government the right to collect taxes and Congress has enacted statutes containing various provisions to enable the Commissioner of Internal Revenue to investigate both civil tax liability and criminal offenses against the revenue. These are two separate and distinct functions, and he has set up separate and distinct divisions to carry out these functions. The function of investigating to determine civil tax liability has been assigned by the Commissioner to Internal Revenue Agents, who are in the Audit Division. (26 CFR 601.105(b)).

"The sole function of a Special Agent in the Intelligence Division of the Internal Revenue Service is to seek evidence of crimes. He has no concern whatsoever with the amount or collection of any additional tax, these being strictly the concern of the Revenue Agent. He is exactly the same as any other Treasury agent who may seek evidence of narcotics, counterfeiting, alcohol tax, customs violations, etc. A Special Agent is a criminal law enforcement officer, just like any state or municipal detective or policeman. He, like any other government agent who enforces the criminal law must obtain a valid search warrant."

—"Searches and Seizures"
by Joseph W. Burns,
20 Institute of Federal Taxation,
New York University 1081, 1087 (1962).

In re National Window Glass Workers, D.C. N.D. Ohio, 287 F. 219. Rules 17 (c) of the Federal Rules of Criminal Procedure, 18 U.S.C.A., has only the limited function of procuring production of papers for use in evidence at a trial. It is not the equivalent of pretrial discovery. Cf. Bowman Dairy Co. v. United States, 341 U.S. 214, 220, 71 S. Ct. 675, 95 L. Ed. 879.

"The Constitution of the United States, the statutes, the traditions of our law, the deep rooted preferences of our people speak clearly. They recognize the primary and nearly exclusive role of the Grand Jury as the agency of compulsory disclosure. That is the inquisitorial body provided by our fundamental law to subpoena documents required in advance of a criminal trial, and in the preparation of an indictment or its particularization. See Hale v. Henkel, 201 U.S. 43, 26 S. Ct. 370, 50 L. Ed. 652.

"To encourage the use of administrative subpoenas as a device for compulsory disclosure of testimony to be used in presentments of criminal cases would diminish one of the fundamental guarantees of liberty. Moreover, it would sanction perversion of a statutory power. The power under § 3614 was granted for one purpose, and is now sought to be used in a direction entirely uncontemplated by the lawgivers. The limitations implicit in every grant of power are that it will be used not colorably, but conscientiously for the realization of those specific ends contemplated by the donors of the power."

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Washington 5, D. C.

Dated: May 8, 1963.

APPENDIX A

Statutory Provisions Cited and Quoted

68A, Stat. 901; 26 USC § 7602
Sec. 7602, Internal Revenue Code of 1954:

> Sec. 7602. For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—
>
> (1) To examine any books papers, records, or other data which may be relevant or material to such inquiry;
>
> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and
>
> (3) To take such testimony of the person concerned, under oath, as may be relevent to such inquiry.

68A, Stat. 902; 26 USC § 7604
Sec. 7604, Internal Revenue Code of 1954:

> Sec. 7604. (a) Jurisdiction of District Court.—If any person is summoned under the internal revenue

laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) Enforcement. — Whenever any person summoned under section 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

APPENDIX B

Copies of Opinion, Judgment, Findings of Fact and Conclusions of Law, Below

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16690

SAMUEL REISMAN, ET AL., APPELLANTS

v.

MORTIMER M. CAPLIN, ET AL., APPELLEES

Appeal from the United States District Court for the District of Columbia

---

Decided February 7, 1963

Messrs. Hans A. Nathan and *Warren E. Magee* for appellants.

Mr. Richard M. Roberts, Attorney, Department of Justice, for appellee Caplin. *Assistant Attorney General Oberdorfer, Messrs. Lee A. Jackson* and *Joseph M. Howard*, Attorneys, Department of Justice, were on the brief for appellee Caplin. *Mr. David C. Acheson*, United States Attorney, also entered an appearance for appellee Caplin.

Robert S. MacClure and *Edward H. Harney*, Co-partners, and all other Co-partners of *Robert S. MacClure*, as a class, d/b/a Peat, Marwick, Mitchell & Co. (a co-partnership) filed a brief pro se.

Before MR. JUSTICE BURTON, retired,* and FAHY and BURGER, *Circuit Judges.*

FAHY, *Circuit Judge*: This appeal is from an order of the District Court dismissing a complaint for a declaratory judgment and injunction against Mortimer M. Caplin, who is the Commissioner of Internal Revenue, and others, and denying plaintiffs' motion for a preliminary injunction. The plaintiffs are attorneys. They set forth in their complaint that they represent certain persons, (a man and his wife), to whom we shall refer as the taxpayers, in controversies of a substantial character which are pending in regard to income tax liabilities to the United States. As such attorneys, they further allege, they employed the services of a firm of expert accountants, Peat, Marwick, Mitchell and Company, particularly defendants MacClure and Harney of the firm, to assist in the preparation for trial of cases pending in the Tax Court against taxpayers, and also to enable plaintiffs better to advise taxpayers in connection with a criminal investigation the defendant Commissioner was threatening to institute. The Tax Court cases were set for October 1961. On June 30, 1961, the Commissioner caused to be served on the accountants at their offices in both Chicago and New York summonses issued by him under the purported authority of § 7602 of the Internal Revenue Code of 1954. The summonses call upon the accounts to give testimony relating to the tax liability of the husband taxpayer and/or certain businesses and to bring with them all books, documents and records in the custody or control of Peat, Marwick, Mitchell and Company which pertained to the taxpayer and other named entities.

Plaintiffs allege that the accountants advised them they would produce the requested documents, located in Chicago, New York or Los Angeles, so as not to risk contempt

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* Sitting by designation pursuant to Sec. 294(a) Title 28, U.S. Code.

proceedings for failure to do so. Plaintiffs further allege that to avoid premature disclosure of their defense strategy, reflected in the documents, with loss of ability effectively to assist taxpayers as counsel if their work product were prematurely disclosed to their opponents, they filed the complaint, joining the accountants as defendants.

The essence of the complaint is that the summonses called for the production of privileged matter, including the work product of counsel, and were not issued for the purpose of assessing taxes or of ascertaining the correctness of any return, but to obtain evidence for use in pending tax cases to prosecute taxpayers criminally.

Plaintiffs moved for a temporary restraining order to prevent the Commissioner from attempting to enforce the summonses directed to the accountants and to restrain the latter from turning over to the Commissioner any of the papers in their possession. The restraining order was issued. Motion for preliminary injunction was also made. The Commissioner opposed this and moved for dismissal of the complaint. The defendants Harney and MacClure, as representatives of the accounting firm, answered, admitting the essential allegations of the complaint and joining in its prayers for relief, which included a prayer that the summonses be quashed.

On the basis of the complaint, an affidavit of one of the plaintiffs in support of the motion for temporary restraining order and preliminary injunction, the answer of defendant accountants, and plaintiffs' answer to interrogatories, the District Court, after hearing argument, granted defendant Caplin's motion to dismiss, entering findings of fact and conclusions of law.[1] The court rejected plaintiffs' contentions that the corporate books, documents and records sought by the summonses constituted the work product of plaintiffs, holding that the work papers and

[1] By stipulation and order based thereon the Commissioner has refrained from enforcing the summonses pending this appeal.

audit reports prepared by the accounting firm were the work product of the accountants and not of plaintiffs. The court also held that the original books, documents, records, work papers and audit reports prepared by the accountants and listed in the summonses were not within the attorney-client privilege.

We think the complaint was properly dismissed, but for a different reason, namely, that it is not within the court's jurisdiction because it is in substance a suit against the United States to which it has not consented. In terms, as well as actually, it is against the Commissioner in his official capacity, seeking to bind him in that capacity, as well as his successors in office and his agents. The statute under which the summonses were issued is not claimed to be unconstitutional; and since the Commissioner has acted within authority delegated by the statute his action may not be considered personal. The suit accordingly seems to us to be an effort to restrain the United States, and therefore to fall within the sovereign immunity doctrine. *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949); *Malone* v. *Bowdoin*, 369 U.S. 643 (1962). While those cases concerned suits over property, where it is more readily seen they were against the United States notwithstanding *United States* v. *Lee*, 106 U.S. 196 (1882), the immunity is not limited to cases involving property. It extends as well to those where the relief sought would "interfere with the public administration," as stated in *Land* v. *Dollar*, 330 U.S. 731 (1947), though that case itself did involve property, or where it appears that "by obtaining relief against the officer, relief" would, "in effect, be obtained against the sovereign." *Larson* v. *Domestic and Foreign Commerce Corp., supra* at 688. And see *Wells* v. *Roper*, 246 U.S. 335, 337 (1918); *Louisiana* v. *McAdoo*, 234 U.S. 627, 632 (1913).

The statute clearly authorizes summonses in the general terms of those before us to be issued by the Commissioner as the delegate of the Secretary of the Treasury. No

doubt there may arise circumstances where in enforcement proceedings[2] it may be found that summonses so issued seek documents which are privileged or otherwise unavailable to the Commissioner. But in this case the Commissioner does not appear as yet to have departed from his statutory authority, to say nothing of having so departed as to justify interpreting the suit to be one against him personally, rather than in substance and effect against the United States. In so viewing the matter we have in mind that the effort is to stop the United States, acting through the Commissioner, has successors and agents, from initiating further steps to obtain documents which the persons summoned cannot be compelled to produce unless and until enforcement proceedings are pursued.

We are reminded of Mr. Justice Douglas' statement in his dissenting opinion in *Malone* v. *Bowdoin*, *supra* at 650, that "policy considerations, not always apparent on the surface, are powerful agents of decision" in sovereign immunity cases. Such considerations argue against a right in the plaintiffs to raise a barrier now against the governmental action of the Commissioner. Under section 7604(b) further proceedings are required before anyone can be compelled to produce the documents. During such pro-

[2] Section 7604(b) of the Internal Revenue Code of 1954 provides:

> Whenever any person summoned under section 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data . . ., the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner . . . for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment . . . for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have the power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

ceedings legal objections and privileges can be interposed for judicial decision. It may then appear that some right or privilege asserted either by those summoned or those claiming through such persons would preclude the Commissioner from obtaining whatever compliance might be sought in the enforcement proceedings. But until these proceedings take form this cannot definitely be known. It would be incumbent upon the judge conducting the enforcement hearing to rule upon objections, taking evidence if necessary relating to various documents involved in order to separate the privileged from the non-privileged. We take it that such a hearing would be a necessary preliminary to citing a summoned party for contempt for failure to comply with a summons, and that a contempt order could not be summarily imposed. See, however, *Application of Colton*, 291 F.2d 487 (2d Cir. 1961).[3] We need not now consider what judicial response would be appropriate if enforcement were attempted under some other statute than Section 7604(b).[4]

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[3] And see *In re Turner*, 309 F. 2d 69 (2d Cir. 1962). Legislative history supports the view that in the enforcement hearing a person summoned should be heard on his claim of privilege before a contempt charge would lie. In the debates on the predecessor of Section 7604(b) this exchange occurred:

> Mr. Stevens. This provides expressly that on appearance the process and everything shall be open to answer.
>
> Mr. Ganson. Not before the attachment is issued.
>
> Mr. Stevens. The attachment is only to bring the party there, and then the answer is open. It will be simply one process instead of two, which will be a great saving in time and expense. It takes no privilege from the party. He is not to be punished until he is heard. This is to be done by the judge. . . .

Cong. Globe, 38th Cong., 1st Sess. 2997 (1864).

[4] The position of the Assistant United States Attorney on this appeal is that a criminal prosecution under Section 7210 of the Revenue Code, referred to in *Application of Colton*, *supra*, and by appellants in a memorandum filed after argument in response to inquiry by the court respecting this section, would not follow from a good faith refusal to comply with a revenue summons.

Finally it must be said that joinder of the private parties who are accountants cannot dictate a different result, that is, serve to vest jurisdiction in the District Court, for the true position of these parties is that of plaintiffs, although nominally they appear as defendants. They seek the same relief as their employer, the plaintiffs.

We conclude that the complaint was properly dismissed, but for the reasons expressed herein.

Affirmed.

Judgment

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF It is ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and it is hereby, affirmed.

It is further ORDERED by the Court that appellees Robert S. MacClure and Edward H. Harney, Co-partners, and all other co-partners of Robert S. MacClure, as a class, d/b/a Peat, Marwick, Mitchell & Co. (a co-partnership) recover from appellants the taxable costs of printing their brief on this appeal, and have execution therefor.

Per Circuit Judge FAHY.

Dated: February 7, 1963.

Samuel Reisman, and Charles M. Trammell, Bert B. Rand, Hans A. Nathan, d/b/a Trammell, Rand & Nathan, Plaintiffs v. Hon Mortimer M. Caplin, and Robert S. MacClure and Edward H. Harney, co-partners and all other co-partners of Robert S. MacClure, as a class, d/b/a Peat, Marwick, Mitchell & Co. (a co-partnership), Defendants.

U.S. District Court, Dist. of Col., Civil Action No. 2216-61, 9/13/61.

Filed Sept. 13, 1961 Harry M. Hull, Clerk

Findings of Fact and Conclusions of Law

This cause regularly came on for hearing on September 7, 1961, before the Honorable George L. Hart, United States District Judge, on the Motion to Dismiss Complaint for Injunction and Declaratory Relief of the defendant, Mortimer M. Caplin, Commissioner of Internal Revenue, and the Motion for Preliminary Injunction of the plaintiffs, Samuel Reisman and Charles M. Trammell, Bert B. Rand and Hans A. Nathan, d/b/a Trammell, Rand & Nathan. The plaintiffs appearing by their attorney, Warren E. Magee, and the defendant, Mortimer M. Caplin, Commissioner of Internal Revenue, appearing by his attorneys, Richard M. Roberts, John M. Burtio and Frank J. Violanti, Tax Division, Department of Justice, Washington, D. C., and the Court having considered the pleadings, the briefs, and the arguments of counsel, makes its findings of fact and conclusions of law as follows:

1. The plaintiff, Samuel Reisman, is a practicing attorney residing in Los Angeles, California. The plaintiffs, Charles M. Trammell, Bert B. Rand and Hans A. Nathan are practicing attorneys in the District of Columbia. Plaintiffs, Charles M. Trammell and Bert. B. Rand, reside in the District of Columbia. Plaintiff, Hans A. Nathan, resides in the State of Virginia.

2. The defendant, Mortimer M. Caplin, is the Commissioner of Internal Revenue, a delegate of the Secretary of the Treasury of the Unitel States of America.

3. The defendants, Robert S. MacClure and Edward H. Harney, are residents of the State of Illinois and are co-partners in the accounting firm of Peat, Marwick, Mitchell & Co.

4. Peat, Marwick, Mitchell & Co. a co-partnership, is an accounting firm composed of numerous certified public accountants and has offices in various states in the United States and abroad.

5. Sometime prior to January 1, 1950, the plaintiff, Samuel Reisman, was retained as counsel by Martin J. Bromley and his wife, Ally Bromley, of 4111 Japus Circle, Honolulu, Hawaii, to act as their legal adviser in connection with their liability for federal income taxes for years beginning with the year 1950 and in connection with other legal matters.

6. On or about April 20, 1960, the plaintiff, Samuel Reisman, associated himself with the plaintiffs, Charles M. Trammell, Bert. B. Rand and Hans A. Nathan, d/b/a Trammell, Rand & Nathan, to act as associate counsel in connection with the tax liability of Martin J. and Allyn Bromley, in particular to assist him in preparing for the trial of certain Tax Court cases involving Martin J. and Allyn Bromley presently pending as Docket Nos. 84961, 84962, 85106 and 87770 and for the purpose of advising Martin J. and Allyn Bromley generally with respect to their tax liability.

7. On or about April 25, 1960, plaintiffs hired the accounting firm of Peat, Marwick, Mitchell & Co., including the defendants Robert S. MacClure and Edward H. Harney, to examine the books of various enterprises in which Martin J. Bromley was engaged.

8. Peat, Marwick, Mitchell & Co. was paid for its services by the plaintiff, Samuel Reisman, who then in turn billed Martin J. and Allyn Bromley for said services as part of the plaintiffs' costs.

9. Subsequent to April 25, 1960, Peat, Marwick, Mitchell & Co. conducted an examination of the original books and records of numerous domestic and foreign corporations in which Martin J. Bromley was a stockholder, of the original books and records of certain domestic and foreign partnerships in which Martin J. Bromley was a partner, and of whatever original books and records Martin J. Bromley kept with respect to his individual enterprises. Some of the original books and records were transmitted to Peat,

Marwick, Mitchell & Co. from the plaintiffs to whom Martin J. Bromley had entrusted them. Some of the original books and records were examined by representatives of Peat, Marwick, Mitchell & Co. at the place where such records were kept, both abroad and in the United States.

10. Peat, Marwick, Mitchell & Co. during the course of its examination of the various original books and records prepared workpapers and audit reports.

11. On June 13, 1961, the defendant, Mortimer M. Caplin, through his various agents, caused to be issued and delivered to Peat, Marwick, Mitchell & Co. at its offices in Los Angeles, California, New York, New York and Chicago, Illinois, certain summonses, Treasury Department Form 2039 A, which called for the production of all books, documents and records in the custody or control of Peat, Marwick, Mitchell & Co., including workpapers and audit reports prepared by Peat, Marwick, Mitchell & Co. pertaining to certain domestic and foreign corporations and for the production of all audit reports, workpapers and correspondence in the custody or control of Peat, Marwick, Mitchell & Co. pertaining to certain domestic and foreign partnerships and Martin J. Bromley. Certain of the summonses were issued in connection with an investigation of the tax liability of Service Games, Inc.-Panama for the years 1953 through 1959. The other summonses were issued in connection with an investigation of the tax liability of Martin J. Bromley for the years 1957 through 1959.

12. The summonses involved seek only the production of books, documents and records, including audit reports and workpapers, in the custody or control of Peat, Marwick, Mitchell & Co. within the territorial limits of the United States of America.

13. All of the work done in the preparation of the workpapers and audit reports sought in the summonses was

done by various representatives of Peat, Marwick, Mitchell & Co.

14. All of the summonses involved were directed to Peat, Marwick, Mitchell & Co. and its representatives and require nothing of the plaintiffs.

15. On July 7, 1961, a temporary restraining order was issued by this Court, based upon the pleadings and affidavits filed by the plaintiff, restraining the defendant, Mortimer M. Caplin, from taking any further steps to enforce the summonses issued to Peat, Marwick, Mitchell & Co. and restraining Peat, Marwick, Mitchell & Co. and the defendants, Robert S. MacClure and Edward H. Harney, from complying with the summonses.

16. On September 7, 1961, this cause came on for hearing on the Motion to Dismiss Complaint for Injunction and Declaratory Relief of the defendant, Mortimer M. Caplin and the Motion for Preliminary Injunction of the plaintiff.

Conclusions of Law

1. The plaintiffs have no standing to sue.

2. The plaintiffs have failed to state a cause of action upon which relief can be granted.

3. The original books, documents and records of the various corporations listed in the summonses involved do not constitute the work product of the plaintiffs.

4. The workpapers and audit reports prepared by the accounting firm of Peat, Marwick, Mitchell & Co. constitute the work product of the accountants and not the work product of the plaintiffs.

5. The original books, documents and records and the workpapers and audit reports prepared by the accountants listed in the summonses involved do not fall within the attorney-client privilege.

6. There has been no showing that the plaintiffs would be likely to prevail if this action were tried and therefore the preliminary injunction should not issue.

/s/ GEORGE L. HART
United States District Judge

Dated this 13th Day of September, 1961

Filed Sept. 13, 1961

Stipulation

It is hereby stipulated and agreed by the parties hereto, through their respective attorneys, that:

1. The defendant Mortimer M. Chapin, Commissioner of Internal Revenue, and all of his agents, will refrain from taking any further steps to enforce the summonses involved in this action pending the final determination of this matter on appeal by the plaintiffs.

2. The plaintiffs will file immediately, and by no later than September 13, 1961, a Notice of Appeal, and will docket the appeal and file the record on appeal within 40 days after filing the Notice of Appeal.

3. All of the books, documents and records, including but not limited to the work papers and audit reports, listed in the summonses involved, and which were in the custody or control of the defendants, Robert S. MacClure and Edward H. Harney, and the accounting firm of Peat, Marwick, Mitchell & Co. on June 13, 1961, which still remain in their possession, custody or control, will remain in the custody and control of said persons pending the final determination of this matter on appeal and any of said books, documents and records which since June 13, 1961 have been turned over and delivered to the plaintiffs, will remain in the custody and control of the plaintiffs pending the final determination of this matter on appeal, and the plaintiffs and

the persons listed above having said custody and control will not remove such books, documents and records from the territorial limits of the United States.

WARREN E. MAGEE
Attorney for Plaintiffs

RICHARD M. ROBERTS
Attorney for Mortimer M. Caplin

B. W. COCHRANE
Representative of Robert S. MacClure and Edward H. Harney, Co-partners and all other co-partners of Peat, Marwick, Mitchell & Co., a co-partnership.

Filed Sept. 13, 1961

Order on Stipulation

UPON CONSIDERATION of the Stipulation of the parties filed in the above-entitled action on September 13, 1961, and, it appearing therefrom that the Defendant Mortimer M. Caplin, Commissioner of Internal Revenue, and all of his Agents will refrain from taking any further steps to enforce the Summonses involved in this action pending the final determination of this matter on Appeal, and that the remaining parties have agreed that all of the books, documents and records (including, but not limited to the work papers and audit reports) listed in the Summonses involved, will remain in their possession, custody and control pending the final determination of this matter on Appeal, and that the remaining parties have agreed that they will not remove such books, documents and records from the Territorial Limits of the United States pending the final determination of this matter on Appeal,

IT IS, by the Court, this 13th day of September, 1961,

ORDERED, that the Stipulation filed herein by the parties on September 13, 1961 be and the same hereby is approved; and

IT IS FURTHER ORDERED, that the parties to this action abide by the provisions of that Stipulation pending the final determination of this matter on Appeal, as provided in the Stipulation.

/s/ GEORGE S. HART, JR.
Judge

Filed March 18, 1963

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1962

No. 16,690

SAMUEL REISMAN, ET AL., *Appellants,*

v.

MORTIMER M. CAPLIN, ET AL., *Appellees.*

Before: Mr. Justice Burton, sitting by designation, and Fahy and Burger, Circuit Judges.

Order

On consideration of appellants' motion for stay pending preparation of petition for certiorari, and of the opposition thereto of appellee Caplin, it is

ORDERED by the court that the motion is hereby denied.

Per Curiam.

Dated: March 18, 1963

APPENDIX C

Conflicting Opinions

PERRY A. DE MASTERS, Internal Revenue Agent, Internal Revenue Service, Arthur G. Erickson, District Director of Internal Revenue, Mortimer M. Caplin, Commissioner of Internal Revenue and The United States National Bank of Portland (Oregon), *Appellants*,

v.

EGON D. AREND and MELA K. AREND, *Appellees*.

No. 17796.

United States Court of Appeals
Ninth Circuit.

Jan. 24, 1963.

Rehearing Denied Feb. 26, 1963.

* * * * * * * * * * *

Before MERRILL, BROWNING and DUNIWAY, Circuit Judges.

BROWNING, Circuit Judge.

The District Court permanently enjoined appellants (employees of the Internal Revenue Service) from investigating possible income tax liability of appellee taxpayers for years as to which recovery would be barred by the statute of limitations in the absence of fraud. The Court also permanently enjoined the United States National Bank of Portland from disclosing to appellants any information regarding transactions by or with the taxpayers during such years. We reject appellants' contention that a District Court has no power to issue such a restraining order in any circumstances, but we conclude that the Court lacked power to do so in the circumstances of this case.

The taxpayers'[1] 1946 and 1948 income tax returns were audited and their records for those years examined during

[1] The taxpayers are husband and wife.

1948 and 1950. In 1957 appellant De Masters, an Internal Revenue agent, began a new investigation of the taxpayers' returns. It is stipulated that the period during which additional income tax could be assessed against taxpayers for any year prior to 1955 had expired, unless fraud were involved.[2] The taxpayers furnished De Masters with the information which he requested until he sought access to taxpayers' records without limitation as to date. Appellees' counsel then advised De Masters that in view of the prior audits and because the taxpayers were not charged with fraud they would not cooperate further in the investigation.

De Masters prepared tentative computations from various sources which indicated that the increase in the taxpayers' net worth, plus their estimated living expenses, during the period 1940 through 1956 totaled approximately $170,000. This increase, after appropriate adjustments, exceeded the income which the taxpayers reported during the same period for tax purposes by more than $90,000. He then examined records of a branch of the First National Bank of Portland reflecting deposits during 1948 to the account of taxpayers' shoe store, and found that they totaled some $17,000 more than the gross receipts reported on taxpayers' income tax return for that year.

De Masters concluded that further investigation was justified, and caused a summons to issue directing the United States National Bank of Portland to produce records pertaining to the taxpayers' transactions with the bank during the years 1940 to 1957. The taxpayers were advised that the bank would comply with the summons. They then filed the present suit for an injunction, naming the bank, the Commissioner of Internal Revenue, the District Director, and De Masters as defendants.

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[2] If a false or fraudulent return with intent to evade the tax, or a willful attempt in any manner to defeat or evade tax, is involved, the tax may be assessed at any time. 26 U.S.C.A. § 6501(c) (1) and (2).

The District Court held a hearing at which De Masters testified as to his computations and the results of his analysis of the taxpayers' 1948 deposits with the First National Bank of Portland. The Court concluded that the appellants had "failed to establish by competent evidence that there exists any reasonable grounds or other probable cause to find or suspect that any fraud existed with respect to any of the returns filed by the plaintiffs for the years that are now closed by the statute of limitations," and that the taxpayers were therefore entitled to an injunction. The Court permanently enjoined the appellants from examining the taxpayers or their records, or any third party as to transactions with the taxpayers, with respect to any year prior to 1955; and permanently enjoined the United States National Bank of Portland from disclosing any information as to transactions with the taxpayers prior to that year.

Appellants contend that (1) the District Court lacked jurisdiction of the action, (2) the suit was one against the United States to which consent had not been given and was therefore barred by the doctrine of sovereign immunity, and (3) the District Court's decision on the merits was erroneous.

I

[1] The taxpayers assert that their suit falls in the category of actions "arising under any Act of Congress providing for internal revenue" over which district courts are granted original jurisdiction by Section 1340 of the Judicial Code.[3] Concededly, appellants purported to act under

[3] "The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue." 28 U.S.C.A. § 1340.

the authority of Section 7602 of the Internal Revenue Code[4] • • • • • • • • • • • • in issuing the summons to the bank. The taxpayers challenged appellants' authority under that section on the ground that the inquiry was prohibited by Section 7605(b) of the Internal Revenue Code[5] as well as by the Fourth Amendment. Since the taxpayers' suit involved a substantial controversy as to the construction and effect of these sections of the Code, we agree with the District Court that if otherwise maintainable the action fell within the jurisdictional grant of Section 1340.[6]

II

[2, 3] Section 1340 is not a consent by the United States to suits against it.[7] However, if appellants were indeed prohibited by Section 7605(b) or the Fourth Amendment from initiating this inquiry, a suit to restrain their unlaw-

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[4] "For the purpose of • • • determining the liability of any person for any internal revenue tax • • • the Secretary or his delegate is authorized—

"(2) To summon • • • any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax • • • to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data • • • as may be relevant or material to such inquiry • • •." Int. Rev. Code of 1954, § 7602, 26 U.S.C.A. § 7602.

[5] "No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary." Int. Rev. Code of 1954, § 7605(b), 26 U.S.C.A. § 7605(b).

[6] See United States v. Coson, 286 F. 2d 453, 456 (9th Cir., 1961).

[7] United States v. Coson, 286 F. 2d 453, 456 (9th Cir., 1961); First Nat'l Bank of Emlenton, Pa. v. United States, 265 F. 2d 297, 299 (3d Cir., 1959). Compare Application of Colton, 291 F. 2d 487, 489-490 (2d Cir., 1961), 75 Harv. L. Rev. 1222 (1962).

ful conduct would not be barred by the doctrine of sovereign immunity.[8]

A. *The Fourth Amendment*

[4, 5] Appellants' conduct did not violate the Fourth Amendment. They did not seek to compel production of the taxpayers' books and records, and if they had the Fourth Amendment would offer no basis for resisting that demand.[9] Assuming that an administrative subpoena directed to a corporation may constitute an "unreasonable search and seizure,"[10] the right violated would be that of the bank whose papers were demanded; but the bank waived any right it might have had to resist production, and the

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[8] Malone v. Bowdoin, 369 U.S. 643, 647-648, 82 S. Ct. 980, 8 L. Ed. 2d 168 (1962); Larson v. Domestic & Foreign Corp., 337 U.S. 682, 689-690, 69 S. Ct. 1457, 93 L. Ed. 1628 (1949), and cases cited; California v. Rank, 293 F. 2d 340, 349-353 (9th Cir., 1961), cert. granted 370 U.S. 936, 82 S. Ct. 1586, 8 L. Ed. 2d 806 (1962). See Harmon v. Brucker, 355 U.S. 579, 581-582, 78 S. Ct. 433, 2 L. Ed. 2d 562 (1958); Stark v. Wickard, 321 U.S. 288, 64 S. Ct. 559, 88 L. Ed. 733 (1944); Colorado v. Toll, 268 U.S. 228, 230, 45 S. Ct. 505, 69 L. Ed. 927 (1925). See also Leedom v. Kyne, 358 U.S. 184, 190, 79 S. Ct. 180, 3 L. Ed. 2d 210 (1958); Application of Colton, 291 F. 2d 487, 489-490 (2d Cir., 1961), and cases cited, 75 Harv. L. Rev. 1222 (1962). See generally 75 Harv. L. Rev. 1479-93 (1962). We are also satisfied that this taxpayers' suit is neither one for declaratory judgment "with respect to federal taxes" precluded by 28 U.S.C. § 2201; nor an action "for the purpose of restraining the assessment or collection of any tax" precluded by 26 U.S.C.A. § 7421(a).

[9] See National Plate & Window Glass Co. v. United States, 254 F. 2d 92 (2d Cir., 1958); Bolich v. Rubel, 67 F. 2d 894 (2d Cir., 1933).

[10] Some doubt is suggested by Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 195, 66 S. Ct. 494, 90 L. Ed. 614 (1946), and First Nat'l Bank of Mobile, Ala. v. United States, 295 F. 142 (S.D. Ala. 1924), aff'd 267 U.S. 576, 45 S. Ct. 231, 69 L. Ed. 796 (1925). See also 69 Yale L.J. 131, 132-33 (1959).

taxpayers could not in any event assert the right on the bank's behalf.[11]

B. *Section 7605(b)*

Section 7605(b) contains two distinct prohibitions. The first is that "no taxpayer shall be subjected to unnecessary examination or investigations"; the second that "only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary."

1. Appellants neither violated the second prohibition nor, at the time of suit, threatened to do so.

[6] This prohibition applies by its express terms only to the *taxpayers'* records; it did not prevent the appellants

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[11] Foster v. United States, 265 F. 2d 183, 187-188 (2d Cir., 1959), and cases cited. The taxpayers rely upon Zimmermann v. Wilson, 81 F. 2d 847 (3d Cir., 1936), but the Court of Appeals for the Third Circuit modified its decision upon this point in a later opinion in the same case reported at 105 F. 2d 583, 586 (1939), stating, "[o]ur present view that a third party is not entitled to invoke the protection of the Fourth Amendment brings our decision in line with the overwhelming weight of authority." See 43 Va. L. Rev. 114 (1957). See also Baskerville v. United States, 227 F. 2d 454, 456 (10th Cir., 1955); United States v. Eversole, 209 F. 2d 766, 768 (7th Cir., 1954). See also United States v. White, 322 U.S. 694, 699, 64 S. Ct. 1248, 88 L. Ed. 1542 (1944), and cases cited; Tileston v. Ullman, 318 U.S. 44, 63 S. Ct. 493, 87 L. Ed. 603 (1943). Fourth Amendment rights do not depend upon nice distinctions of property law (cf. Silverman v. United States, 365 U.S. 505, 511, 81 S. Ct. 679, 5 L. Ed. 2d 734 (1961), and cases cited), but the taxpayers had no interest in the bank's records of the kind the Fourth Amendment was intended to protect. Their interest was no different nor greater than that which they would have in denying appellants' access to documentary evidence belonging to, in the possession of, and to be produced by, any third person, which might contain information damaging to the taxpayers. Cf. Jones v. United States, 362 U.S. 257, 261, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960).

from seeking information from other sources, such as the bank, regarding the taxpayers' possible liability.[12] Indeed, the section anticipates that such inquiries will be made; as we read it, the section intends that the Commissioner of Internal Revenue (the Secretary's delegate) shall notify the taxpayer of an additional inspection of the taxpayer's books only "after investigation" from which the Commissioner concludes that "an additional inspection is necessary," and the preliminary investigation referred to must necessarily be an inquiry of sources other than the taxpayer.

There is nothing to indicate that appellants intended to seek a second inspection of the taxpayers' records for the years 1946 and 1948 unless, and until, the investigation of other sources required by Section 7605(b) had been completed, and had disclosed that an additional inspection of taxpayers' records was necessary. De Masters testified that the reason the taxpayers had not been notified of a second examination of their own records was that he had not completed the preliminary investigation required to sustain the notice. The threat that appellants would attempt a second examination of taxpayers' records without first satisfying the prerequisites of Section 7605(b) was at best remote and speculative.[13]

2. We turn finally to the provision of Section 7605(b) that "[n]o taxpayer shall be subjected to unnecessary examinations or investigations."

[7] The command is unequivocal. We have held that it constitutes "a limitation on the power" of the tax collect-

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[12] Application of Magnus, 299 F. 2d 335 (2d Cir., 1962); Foster v. United States, 265 F. 2d 183, 188 n. 3 (2d Cir., 1959); Hubner v. Tucker, 245 F. 2d 35, 39 (9th Cir., 1957).

[13] See Eccles v. Peoples Bank, 333 U.S. 426, 431, 68 S. Ct. 641, 92 L. Ed. 784 (1948).

ing authorities; appellants, in consequence, had "no power to make an unnecessary examination or investigation."[14] As we have said, if appellants violated this statutory limitation upon their power, the present suit is maintainable.[15] The difficult problem, of course, is that of determining the scope of the limitation: what is meant by an "unnecessary" investigation?

[8, 9] The Commissioner's statutory duty and power to inquire are stated in broad terms. He is directed to "cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax."[16] He is authorized to examine records and data and to require persons liable for tax and others to appear, give testimony,

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[14] Martin v. Chandis Securities Co., 128 F. 2d 731, 735-736 (9th Cir., 1942). We have been invited to re-examine Chandis in the light of Application of Magnus, 299 F. 2d 335, 337 (1962), in which the Court of Appeals for the Second Circuit recently held that the prohibition in Section 7605(b) against unnecessary investigations (as well as that against repeated inspections of taxpayer's books and records) applies only to inquiries made of the taxpayer personally, and does not extend to inquiries made of third persons even though concededly part of an investigation directed solely to the taxpayer's liability. As the Court in Magnus points out, inquiries of thir parties impose no burden upon the taxpayers, the third parties may have judicial protection from unwarranted and unreasonable search and seizure independently of Section 7605(b), and the government would not be barred from making inquiries which might throw light on the taxpayer's liability and enable the government to demonstrate that a direct examination of the taxpayer and his records is necessary. See also Foster v. United States, 265 F. 2d 183, 188 n. 3 (2d Cir., 1959). But see Colton v. United States, 306 F. 2d 633, 635-636 (2d Cir., 1962), petition for cert. denied 83 S. Ct. 505 (1962). However, the disposition which we make of the present case renders a re-examination of Chandis unnecessary.

[15] See note 8, supra.

[16] Int. Rev. Code of 1954, § 7601, 26 U.S.C.A. § 7601.

and produce records and data, relevant or material to an inquiry "for the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax * * * or collecting any such liability."[17]

These grants of power are to be liberally construed in recognition of the vital public purposes which they serve;[18] the exception stated in Section 7605(b) is not to be read so broadly as to defeat them.[19] A limited construction of Section 7605(b) is also supported by the law's general antipathy to the erection of barriers to the ascertainment of truth,[20] and the policy against judicial intervention in the investigative stage of tax matters because of the danger of undue delay in the collection of the revenues.[21]

[10, 11] An investigation cannot be said to be "unnecessary" if it may contribute to the accomplishment of any of the purposes for which the Commissioner is authorized by statute to make inquiry. Since these include making a return where none has been made and ascertaining the correctness of any that have, the taxpayer[22] will rarely be

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[17] Int. Rev. Code of 1954, § 7602, 26 U.S.C.A. § 7602.

[18] Falsone v. United States, 205 F. 2d 734, 742 (5th Cir., 1953).

[19] Application of United States, 246 F. 2d 762, 765 (2d Cir., 1957).

[20] Application of Magnus, 299 F. 2d 335, 337 (2d Cir., 1962); McMann v. SEC, 87 F. 2d 377, 109 A.L.R. 1445 (2d Cir., 1937).

[21] See Enochs v. Williams Packing Co., 370 U.S. 1, 7, 82 S. Ct. 1125, 8 L. Ed. 2d 292 (1962); N.Y.U. 18th Annual Institute on Federal Taxation 958 (1960).

[22] Perhaps a third person might show that an investigation was unnecessary as to him because he had no material relating to the taxpayer's liability, but here the issue is more likely to arise in resisting enforcement of a summons and the ground for relief more likely to be stated in terms of the burdensomeness of the demand. See United States ex rel. Sathre v. Third Northwestern Nat'l Bank, 102 F. Supp. 879 (D. Minn. 1952); Foster v. United States, 265 F. 2d 183, 187 n. 2 (2d Cir., 1959); 60 Mich. L. Rev. 187, 204-05 (1961).

able to discharge his burden of showing that the first investigation of a particular tax year is unnecessary. The legislative history, though sparse, tends to confirm the impression that Congress was primarily concerned with protecting taxpayers from examinations which were "unnecessary" in the sense that they followed prior investigations of the same matter which had established that there was no basis for liability.[22] As the Court of Appeals for the Sec-

[22] It may also be drawn from the remarks of sponsors of the provision that Congress anticipated that its purpose of ending such "frivolous" investigations would be accomplished primarily through administrative control resulting from the requirement that the Secretary notify the taxpayer in writing of the necessity for repeating the inquiry—although it should be added that there is nothing to indicate an intention to exclude judicial intervention if administrative control should fail. What is now Section 7605 (b) of Title 26 first appeared as Section 1308 of the Revenue Bill of 1921. In presenting the proposal to the House, Congressman Hawley, in charge of the measure, stated (61 Cong. Rec. 5202 (1921)):

"We had instances before us where the books of a corporation or an individual had been examined four or five times, with four or five different assessments of taxation. There ought to be one levy of tax, one determination of it. It ought to be settled once for all when a man pays his tax, unless there should be good cause for a re-examination.

* * * * *

"Of course the Commissioner would not cause a frivolous examination to be made or an examination to be made on a frivolous ground."

Similarly, Senator Penrose, in charge of the measure, advised the Senate (61 Cong. Rec. 5855 (1921)):

"[B]itter complaints have reached me and have reached the department of unnecessary visits and inquisitions after a thorough examination is supposed to have been had. This section is purely in the interest of quieting all this trouble and in the interest of the peace of mind of the honest taxpayer."

In the same passage, Senator Penrose agreed with the statement of Senator Walsh that the purpose of the Section as "to limit

ond Circuit has said, "The stricture against 'unnecessary' examinations was designed to prevent uselessly reptitive procedures and investigations not relevant to possible tax liability, not to nullify the preceding sections of the Code." [24]

[12-14] The investigative power granted administrative agencies is inquisitorial in nature; its exercise does not depend upon a showing of probable cause to believe that a violation of law has occurred.[25] This is true of the power of inquiry vested in the Commissioner.[26] Clearly, he may as a general rule check to determine whether a return should have been filed where one was not, or whether more tax was due than was actually paid, without first showing that there was probable cause, or any cause at all, to believe that these things were true. The Bureau of Internal Revenue, like other administrative agencies charged with enforcement of law, "can investigate merely on suspicion

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the inspection to one visit unless the Commissioner indicates that there is necessity for further examination."

The report of the Senate Committee (S. Rep. No. 275, 67th Cong., 1st Sess. 31 (1921)) states that the provision "is designed to meet the complaint of taxpayers that they are subjected to onerous and unnecessarily frequent examinations and investigations by revenue agents." H.R. Rep. No. 337, 67th Cong., 1st Sess. 16 (1921), is to the same effect.

[24] Application of the United States, 246 F. 2d 762, 765 (1957); 60 Mich. L. Rev. 187, 204-05 (1961).

[25] United States v. Morton Salt Co., 338 U.S. 632, 642-643, 70 S. Ct. 357, 94 L. Ed. 401 (1950); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 214-216, 66 S. Ct. 494, 90 L. Ed. 614 (1946); Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 63 S. Ct. 339, 87 L. Ed. 424 (1943); Hagen v. Porter, 156 F. 2d 362, 365 (9th Cir., 1946); 69 Yale L. J. 131, 133 (1959); 1 Davis, Administrative Law, § 3.12 (1958).

[26] Foster v. United States, 265 F. 2d 183, 186 (2d Cir., 1959), and cases cited.

that the law is being violated, or even just because it wants assurance that it is not." [27]

But the taxpayers assert that Section 7605(b) creates an exception to this rule where the Commissioner seeks to investigate a return for a tax year as to which, unless fraud is shown, the statute of limitations has barred additional assessment.[28] It is not apparent why this should be so.

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[27] United States v. Morton Salt Co., 338 U.S. 632, 642-643, 70 S. Ct. 357, 94 L. Ed. 401 (1950).

[28] The decisions of the Courts of Appeals establish no clear rule as to whether an additional showing is required of the government in these circumstances to obtain enforcement of a subpoena issued under Section 7602, and, if so, what that showing must be. *First:* The Court of Appeals for the First Circuit has most nearly approached a requirement that "probable cause" in the Fourth Amendment sense be shown (O'Connor v. O'Connell, 253 F. 2d 365, 369-370 (1958); Lash v. Nighosian, 273 F. 2d 185, 188-189 (1959)), and in so doing expressly disagrees with holdings of Courts of Appeals for the Second and Fifth Circuits (253 F. 2d at 370). However, the Court views the issue as one of fact as to which the Commissioner's determination is binding if supported "by witnesses whose testimony, although contradicted, was not so incredible as to be beyond reasonable belief" (273 F. 2d at 189). *Second:* The Court of Appeals for the Second Circuit appeared to adopt the rule that no showing need be made as to possible fraud: "Nor should [the Bureau] be required to prove the grounds of its belief prior to examination of the only records which provide the ultimate proof" (United States v. United Distillers Prods. Corp., 156 F. 2d 872, 874 (1946)); "The Commissioner is therefore entitled to the examination if it may shed light on whether a liability still exists or whether it has been time-barred • • • the Commissioner • • • should not be required to prove grounds for belief that the liability was not time-barred" (Foster v. United States, 265 F. 2d 183, 187 (1959)). But the Court nonetheless treated the question as still open in Application of United States, 246 F. 2d 762, 765 (1957), and again in Application of Magnus, 299 F. 2d 335, 337 (1962). *Fourth:* The Court of Appeals for the Fourth Circuit noted the difference in view among the Courts of Appeals and found it unnecessary to resolve it, but took it to be admitted that "a bona fide suspicion of fraud justifies the investigation of the appropriate records." Wall v. Mitchell, 287 F. 2d 31 (1961). *Fifth:* The

[15] The Commissioner's power and duty to investigate for the purpose of "determining the liability of any person for any internal revenue tax" [29] surely includes liability which may be assessed on a finding of fraud. And even if no fraud exists, the investigation of barred years may be useful or even essential to establish a sound starting point for checking the accuracy of returns filed in years that re-

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Court of Appeals for the Fifth Circuit is usually cited as requiring no showing of facts justifying a suspicion of fraud on the basis of its cryptic opinion in Globe Constr. Co. v. Humphrey, 229 F. 2d 148 (1956). See, e. g., O'Connor v. O'Connell, supra, 253 F. 2d at 370. *Sixth:* The Sixth Circuit has held that an agent's testimony that he had concluded from his investigation that there was a strong suspicion of fraud was sufficient, and that "[t]he special agent was not obliged to disclose in detail the facts relative to his investigation and conclusion, nor was the District Court obliged to require proof of facts showing reasonable grounds to believe that the tax returns * * * were false or fraudulent." Peoples Deposit Bank & Trust Co. v. United States, 212 F. 2d 86, 87 (1954). In Corbin Deposit Bank v. United States, 244 F. 2d 177 (1957), the Court said, "[p]robable cause * * * was established by the testimony of an internal revenue agent who enumerated facts showing reasonable grounds for a suspicion of fraud," and the District Court properly excluded "evidence for the purpose of proving that the taxpayers in fact had filed honest returns." Finally, in Eberhart v. Broadrock Dev. Corp., 296 F. 2d 685, 687 (1961), the Court stated, "there was at least an inference that fraud extended into some of the previous years. In our judgment, this was sufficient to authorize the examinations." *Ninth:* The Court of Appeals for the Ninth Circuit in Martin v. Chandis Securities Co., 128 F. 2d 731, 735 (1942), acted upon an agreement of the parties that a showing was required "of probable cause, sometimes called reasonable ground for suspicion of fraud", but "without expressing any opinion as to the soundness thereof." In Boren v. Tucker, 239 F. 2d 767 (1956), we found the test assumed in Chandis to be satisfied by proof of a "possibility" of fraud, and expressed approval of Globe, supra, 229 F. 2d 148 (5th Cir.), and Peoples Deposit, supra, 212 F. 2d 86 (6th Cir.), both of which, as noted above, require no showing as to the likelihood of fraud. 239 F. 2d at 769-70, 773.

[29] Int. Rev. Code of 1954, § 7602, 26 U.S.C.A. § 7602.

main open.[30] If a preliminary showing of probable cause is not necessary before initiating investigations for other authorized purposes, how can it be required for these?

[16] The taxpayers suggest two reasons: a policy against the presumption of fraud; and a policy in favor of preserving the integrity of the statute of limitations. But it is not necessary to presume fraud to justify an investigation to determine whether it exists. The Commissioner's power to investigate particular returns for normal errors or omissions is not based upon a presumption that they will be found. And while the policy in favor of composing strife, reflected in the statute of limitations, is entitled to protection, so too is the Congressional policy that fraud affecting the revenue shall be exposed and penalized without regard to the elapse of time, especially in a tax system so largely based on self-assessment.

[17] We think the limitations imposed upon the Commissioner by the interdiction of "unnecessary" investigations are essentially the same as those which may preclude judicial enforcement of administrative subpoenas: "that he shall not act arbitrarily or in excess of his statutory authority, but this does not mean that his inquiry must be 'limited * * * by forecasts of the probable result of the investigation.'"[31] These limitations are appropriate "to

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[30] Falsone v. United States, 205 F. 2d 734, 743 (5th Cir., 1953); Norda Essential Oil & Chem. Co. v. United States, 230 F. 2d 764, 765 (2d Cir., 1956). Appellants do not appear to rely upon this basis for now examining the barred years in the present case, apparently satisfied that the returns filed in the open years were accurate; they do argue, however, that the injunction should at least be modified so as not to preclude such an examination if evidence of deficiencies in the open years were later obtained.

[31] Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 216, 66 S. Ct. 494, 90 L. Ed. 614 (1946).

This does not mean that Section 7605 (b) adds nothing to the taxpayers' protection. Section 7605(b) permits a judicial testing of the basic legality of the administrative action at an earlier stage

secure the public interest and at the same time to guard the private ones affected against the only abuses from which protection rightfully may be claimed. * * * They are rather the interests of men to be free from officious intermeddling, whether because irrelevant to any lawful purpose or because unauthorized by law, concerning matters which on proper occasion and within lawfully conferred authority of broad limits are subject to public examination in the public interest. Officious examinations can be expensive * * * time consuming * * *. [and] * * * persecution when carried beyond reason"; but to bar investigation by the Commissioner because evidence of unlawful conduct is not yet available "would stop much if not all of investigation in the public interest at the threshold of inquiry and * * * render substantially impossible his effective discharge of the duties of investigation and enforcement which Congress has placed upon him."[32]

[18] Of course, proof that the period for assessment absent fraud has expired is relevant to the question of whether an investigation is "unnecessary," just as it would be relevant to whether a court should enforce an administrative subpoena.

[19] The purposes for which the Commissioner is authorized to investigate would then be limited. If he asserted no purpose other than one which was then barred of accomplishment (or asserted a purpose not authorized by the statute),[33] the proposed investigation would be "unnecessary" under Section 7605(b) and might be enjoined,

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than might otherwise be possible, and it provides a novel check on repetitious investigations which, as we have seen (note 23), was apparently its principal purpose.

We are not here concerned with limitations based upon the breadth of the inquiry or the relevance to the inquiry of the material sought. 1 Davis, Administrative Law § 3.05 (1958).

[32] 327 U.S. at 213, 66 S. Ct. at 508, 90 L. Ed. 614.

[33] See Pacific Mills v. Kenefick, 99 F. 2d 188 (1st Cir., 1938),

just as an administrative subpoena issued by the Commissioner in such circumstances would be denied judicial enforcement as "in excess of his statutory authority."

[20] Even though the Commissioner asserted a purpose to investigate for fraud, or to confirm a deficiency in an open year, as he was authorized to do, the likelihood that the inquiry might be "unnecessary" or the issuance of a subpoena "arbitrary," would at least be enhanced by the relative infrequency with which either fraud, or the need for indirect verification of a deficiency, normally occurs. And if it appeared that the decision to investigate in aid of that purpose was in fact reached as a matter of rational judgment based on the circumstances of the particular case, then the investigation would not be an "unnecessary" one prohibited by Section 7605(b), just as the act of issuing an administrative subpoena in such circumstances would not be "arbitrary" and the subpoena unenforceable.

This limited extension of the area of proper judicial intervention in the process of administrative investigation is justified by a significant change in the relevant balance of public and private interests which takes place with the running of the statute of limitations. The government's need for speedy and unimpeded access to the facts is diminished when the problem shifts from that of checking the accuracy of the returns of sixty million taxpayers within the relatively short period of limitations, to that of ferreting out the rare instance of liability for fraud which can never be barred by the passage of time. From the taxpayer's point of view, an inquiry which can be readily met when memories are clear and records readily available, may become difficult to satisfy with a lapse of time, possibly extending, as in this case, to a score or more of years.

[21] The showing by the taxpayers in the present case that further assessment was time-barred in the absence of fraud may have been sufficient to require the appellants to go forward with a justification of their inquiry. But this

they did, and the showing which they made was sufficient to establish (1) that further investigation was undertaken pursuant to the Commissioner's authority, and (2) that the decision to proceed was not arbitrary. No more was required.

Reversed.

Application of EDWARD E. COLTON and LILLIAN KALTMAN, *Appellants*,

To Quash a Summons to Appear to Testify and to Produce Books, etc., relating to the Tax Liability of HERBERT MATTER and MERCEDES MATTER.

INTERNAL REVENUE SERVICE OF THE UNITED STATES TREASURY DEPARTMENT, *Appellee*.

Docket 26939.

United States Court of Appeals
Second Circuit.

Argued June 5, 1961.

Decided June 21, 1961.

Motion to vacate a summons issued by a special agent of the Internal Revenue Service pursuant to statute. The United States District Court for the Southern District of New York, Archie Owen Dawson, J., denied the motion and an appeal was taken. On a motion to dismiss the appeal, the Court of Appeals, Friendly, Circuit Judge, held that the District Court had jurisdiction of the motion to vacate the summons and that the order of denial was appealable.

Motion to dismiss denied.

* * * * * * * * * * *

Before LUMBARD, Chief Judge, and GOODRICH* and FRIENDLY, Circuit Judges.

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* Of the Third Circuit, sitting by designation.

FRIENDLY, Circuit Judge.

Edward E. Colton and Lillian Kaltman, members of the bar of the State of New York, obtained an order, in the District Court for the Southern District of New York, requiring the Internal Revenue Service to show cause why two summons dated July 29, 1960, requiring them to appear before a special agent to give testimony and produce "Retained copies of income tax returns, workpapers, correspondence file, memoranda and all other data relating to the preparation and the filing of Federal Income Tax Returns for or on the behalf of" their clients, Herbert and Mercedes Matter, from 1951 through 1958, should not be quashed or modified. There were several adjournments, during which movants appeared before the special agent without prejudice to their pending motion, and gave such testimony, relatively small in scope, as they considered not to violate the attorney-client privilege. On February 28, 1961, Judge Dawson denied the motion to quash or modify and vacated the stay previously issued. Colton was then served with another summons. On March 24, 1961, he appeared before the agent and again raised the attorney-client privilege. At the same time, an appeal from Judge Dawson's order of denial was taken to this Court. The Internal Revenue Service moves to dismiss the appeal for lack of appellate jurisdiction and mootness; it also challenges the jurisdiction of the District Court.

Section 7602(2) of the Internal Revenue Code of 1954 authorizes the Secretary of the Treasury or his delegate to summon either the person liable for tax or anyone else to appear at a time and place named in the summons and "to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material" to any pending inquiry as to non-compliance with the tax laws. Section 7603, 26 U.S.C.A. § 7603, tells how such a summons shall be served. Section 7604(a), 26 U.S.C.A. § 7604(a), endows the United States district court for the district in which any person summoned re-

sides or is found with "jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data." Section 7604(b) provides that when any person so summoned "neglects or refuses to obey such summons, or to produce such books, papers, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for contempt"; after hearing, the judge or the commissioner "shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to * * * the summons and to punish such person for his default or disobedience." Finally, Section 7210, 26 U.S.C.A. § 7210, provides that any person who, being duly summoned "as required under sections * * * 7602, 7603, and 7604(b), neglects to appear or to produce such books, accounts, records, memoranda, or other papers, shall, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with costs of prosecution."

[1] These statutes appear to be much more drastic than the usual provisions as to subpoenas by administrative agencies. As we read them, resort by the Government to the district court under § 7604(a), 26 U.S.C.A. § 7604(a), is permissive only; this is in no way a condition to any other action. It is not entirely clear whether, under § 7604(b), the judge or the commissioner might, if he so chose, punish for contempt without giving the witness an opportunity to answer or, as was intimated in Brody v. United States, 1 Cir., 1957, 243 F. 2d 378, 381, certiorari denied 1957, 354 U.S. 923, 77 S. Ct. 1384, 1 L.Ed. 2d 1438, the proceeding is only one "to obtain the assistance of the court in forcing [the witness] to give the desired information to the Internal Revenue Service by the device of having the court issue an order to that effect, disobedience of

which would be a contempt punishable by the court." In any event it is plain that the criminal penalty of § 7210 is not contingent upon prior action under either § 7604(a) or § 7604(b); that is what the words say and we so applied them in United States v. Becker, 2 Cir., 1958, 259 F. 2d 869, certiorari denied 1959, 358 U.S. 929, 79 S. Ct. 317, 3 L. Ed. 2d 303, as the record in that case shows, see also Chief Judge Magruder's statement in Brody v. United States, supra.

Neither the Internal Revenue Code nor any other statute contains specific provision for a motion by a person receiving a summons under § 7602, 26 U.S.C.A. § 7602, to vacate or modify it. Petitioners have cited a number of instances where motions to that end have been entertained in this Circuit, apparently without objection from the Government, some of which have reached this Court: International Commodities Corp. v. Internal Revenue Service, 2 Cir., 1955, 224 F. 2d 882; First National City Bank of New York v. Internal Revenue Service, 2 Cir., 1959, 271 F. 2d 616, certiorari denied 1960, 361 U.S. 948, 80 S. Ct. 402, 4 L.Ed. 2d 381; Application of Daniels, D.C.S.D.N.Y. 1956, 140 F. Supp. 322; Application of Burr, D.C.S.D.N.Y. 1959, 171 F. Supp. 448. Despite this the Service now says that the District Court lacks jurisdiction over such a motion, which the Service claims to be a suit against the Government without its consent, appellants, sustaining jurisdiction under 28 U.S.C. § 1340, and relying on Arend v. De Masters, D.C.D.Or. 1960, 181 F. Supp. 761, suggest we postpone determination of that issue to the argument of the appeal. We think the question so closely related to that of our appellate jurisdiction that we had best decide it now.

[2] If the statutory scheme were like that for enforcement of subpoenas of such agencies as the Interstate Commerce Commission, 49 U.S.C.A. § 12, or the Civil Aeronautics Board, 49 U.S.C.A. § 1484, there would be merit in the Government's position that courts ought not intervene

at so early a stage; since disobedience to a subpoena under those statutes has no penal consequences until a judge has ordered its enforcement, there is no occasion for any preliminary resort to the courts. Here, however, at least the criminal penalty of § 7210 is incurred by disobedience, and it is not altogether plain that a contempt citation under § 7604(b) may not be. Under such circumstances the principle of Ex parte Young, 1908, 209 U.S. 123, 147, 28 S. Ct. 441, 52 L. Ed. 714, and Oklahoma Operating Co. v. Love, 1920, 252 331, 336-337, 40 S. Ct. 338, 64 L. Ed. 596, comes into play; we see no reason why that principle should not be applicable to a summons, disobedience of which carries criminal penalties. We note that the dismissal of the bill in F. T. C. v. Claire Furnace Co., 1927, 274 U.S. 160, 47 S. Ct. 553, 71 L. Ed. 978, was for supposed lack of equity rather than because of sovereign immunity, and that the Supreme Court, more recently, has expressly declined to rule that reporting orders under § 6 of the Federal Trade Commission Act, 15 U.S.C.A. § 46, are "exempt from judicial examination," United States v. Morton Salt Co., 1950, 338 U.S. 632, 654, 70 S. Ct. 357, 370, 94 L. Ed. 401, although no method for such examination save a suit against government officers would seem available. See United States v. St. Regis Paper Co., 2 Cir., 1960, 285 F. 2d 607, 615-616, certiorari granted 1961, 365 U.S. 857, 81 S. Ct. 825, 5 L. Ed. 2d 822. We are not unmindful of the potentialities of delay inherent in such an extra round—potentialities sufficiently serious without one, as illustrated, for example, by Penfield Co. of Cal. v. S. E. C., 1947, 330 U.S. 585, 67 S. Ct. 918, 91 L. Ed. 1117; but the Government seems to be a victim of its own Draconianism. We hold the District Court had jurisdiction of the motion and thus reach the question of our appellate jurisdiction to review its denial.

[3] In support of its contention that the order denying the motion to quash or modify the summons was interlocutory and not appealable, appellee places primary reliance on Cobbledick v. United States, 1940, 309 U.S. 323, 60 S. Ct.

540, 84 L. Ed. 783, which held that an order denying a motion to quash a subpoena *duces tecum* to appear before a grand jury was not a final judgment within the predecessor of 28 U.S.C. § 1291. However, the Supreme Court there reaffirmed I. C. C. v. Brimson, 1894, 154 U.S. 447, 14 S. Ct. 1125, 38 L. Ed. 1047, Harriman v. I. C. C., 1908, 211 U.S. 407, 29 S. Ct. 115, 53 L. Ed. 253, and Ellis v. I. C. C., 1911, 237 U.S. 434, 35 S. Ct. 645, 59 L. Ed. 1036, upholding the appealability of orders of district courts directing witnesses to answer in proceedings to compel testimony under § 12 of the Interstate Commerce Act,[1] and distinguished those decisions both from the case before it and from Alexander. v. United States, 1908, 201 U.S. 117, 26 S. Ct. 356, 50 L. Ed. 686, which had held that an order requiring a witness, not a party, to appear in a pending action was not final and appealable, on the ground, 309 U.S. at page 330, 60 S. Ct. at page 543, that "The doctrine of finality is a phase of the distribution of authority within the judicial hierarchy. But a proceeding like that under § 12 of the Interstate Commerce Act may be deemed self-contained, so far as the judiciary is concerned—as much so as an independent suit in equity in which appeal will lie from an injunction without the necessity of waiting for disobedience."

Applying that distinction, we have held that an order under § 7404(a), 26 U.S.C.A. § 7404(a), directing a person to testify is final and appealable, under 28 U.S.C. § 1291; In re Albert Lindley Lee Memorial Hospital, 2 Cir., 1953, 209 F. 2d 122, certiorari denied sub nom. Cincotta v. United States, 1954, 347 U.S. 960, 74 S. Ct. 709, 98 L. Ed. 1104, following Falsone v. United States, 5 Cir., 1953, 205 F. 2d 734, certiorari denied 1953, 346 U.S. 864, 74 S. Ct. 103, 98 L. Ed. 375, accord, O'Connor v. O'Connell, 1 Cir., 1958, 253 F. 2d 365, thereby necessarily joining the Fifth Circuit in its expressed disagreement with Jarecki v. Whetstone, 7 Cir., 1951, 192 F. 2d 121, which the Government nevertheless urges upon us here. See First National Bank of Mo-

[1] The Harriman case included a cross-appeal by the Commission from a denial of an order as to two questions.

bile, Ala. v. United States, 1925, 267 U.S. 576, 45 S. Ct. 231, 69 L. Ed. 796. However, that does not completely settle that an order denying relief in a proceeding instituted by the witness is similarly final and appealable. We held that it was in International Commodities Corp. v. Internal Revenue Service, 2 Cir., 1955, 224 F. 2d 882. Cf. Goldfine v. Pastore, 1 Cir., 1958, 261 F. 2d 519. Also in In re National Public Utility Investing Corp., 2 Cir., 1935, 79 F. 2d 302; United States v. United Distillers Products Corp., 2 Cir., 1946, 156 F. 2d 872; Norda Essential Oil & Chemical Co. v. United States, 2 Cir., 1956, 230 F. 2d 764, certiorari denied 1956, 351 U.S. 964, 76 S. Ct. 1028, 100 L. Ed. 1484; and Application of United States, 2 Cir., 1957, 246 F. 2d 762, certiorari denied Carroll v. United States, 1957, 355 U.S. 857, 78 S. Ct. 85, 2 L. Ed. 2d 64, we entertained appeals from denials of motions to vacate orders which the Government had obtained ex parte under § 7604(a). In First National City Bank of New York v. Internal Revenue Service, 2 Cir., 1959, 271 F. 2d 616, certiorari denied 1960, 361 U.S. 948, 80 S. Ct. 402, 4 L. Ed. 2d 381, we took jurisdiction over an appeal by the Service from an order granting a witness' motion to modify a summons in such a proceeding. The Government now contends, however, that a subsequent unreported memorandum decision, dated March 31, 1960, in that same proceeding, dismissing an appeal by the bank, is contrary to the International Commodities decision and must be deemed to have overruled it.

We think the International Commodities decision was right and should be followed. The purpose of a motion to modify or vacate the summons is to obtain an advance judicial determination of the validity of the summons and thereby obviate the unpleasant consequences which § 7210 and perhaps § 7604(b) visit upon disobedience. What is called the denial of a motion is, therefore, in effect the dismissal of a complaint. Cf. Perlman v. United States, 1918, 247 U.S. 7, 38 S. Ct. 417, 62 L. Ed. 950; Essgee Co. of China v. United States, 1923, 262 U.S. 151, 43 S. Ct. 514, 67 L. Ed. 917; Go-Bart Importing Co. v. United States, 1931, 282 U.S.

344, 51 S. Ct. 153, 75 L. Ed. 374; Russo v. United States, 2 Cir., 1957, 241 F. 2d 285, certiorari denied 1957, 355 U.S. 816, 78 S. Ct. 18, 2 L. Ed. 2d 33, and contrast Cogen v. United States, 1929, 278 U.S. 221, 49 S. Ct. 118, 73 L. Ed. 275. The memorandum decision in the later First National City Bank case, relied on by the Government, is entirely reconcilable with this view. The appeal there was from the denial of a second motion to vacate the summons, made by the bank after remand, wherein it proposed to supply the deficiencies in its proof of violation of Panamanian law which had led this Court, on the first appeal, to reverse the District Court's modification of the summons "with a direction to reinstate the subpoena as it originally issued and in the event of non-compliance to explore in contempt proceedings under 26 U.S.C. § 7604 the ability of the Bank to comply without subjecting its personnel to criminal sanctions under Panamanian law," 271 F. 2d at page 620. The District Court held the attempted second bite at the cherry by a further motion to be inconsistent with our mandate. We read the memorandum decision's statement that "there has not as yet been a final order below from which an appeal may be taken" as meaning that under the particular circumstances of that case there would be no appealable order until the path marked out by this Court's mandate had been followed to the end; we do not believe the panel meant to overrule, without discussion, the Court's explicit decision in International Commodities, which had not even been cited to it.

[4] There is no merit to the Government's claim that the appeal is moot, at least as to appellant Colton. There has been no disclaimer by the Service of its intention to require Colton to appear and produce books and records which he considers himself forbidden to do by the attorney-client privilege. The Government cannot render a case of this sort moot simply by substituting a new summons for an old one. Yarnell v. Hillsborough Packing Co., 5 Cir., 1934, 70 F. 2d 435, 438, 92 A.L.R. 1475.

Motion to dismiss appeal denied.